# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West High Yield (W.H.Y.) Resources Ltd. v. Save Record Ridge Action Committee Society,* 2026 BCCA 177

Date: 20260415
Docket: CA51427

Between:

**West High Yield (W.H.Y.) Resources Ltd.**

Appellant

And

**Save Record Ridge Action Committee Society**

Respondent
(Petitioner)

And

**Minister of Environment and Parks**

Respondent
(Respondent)

And

**Sinixt Confederacy**

Respondent
(Respondent)

And

**Chief Permitting Officer of British Columbia**

Respondent

Before: The Honourable Justice Riley
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 11, 2026 (*Save Record Ridge Action Committee Society v. British Columbia (Environment and Parks)*, 2026 BCSC 477, Rossland Docket S16387).

## Oral Reasons for Judgment

Counsel for the Appellant: J.M. Young
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| Counsel for the Respondent, Save Record Ridge Action Committee Society: | B. Isitt<br>N. Mock |
| Counsel for the Respondent, Sinixt Confederacy: | J. Riddle |
| Place and Date of Hearing: | Vancouver, British Columbia<br>April 10, 2026 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>April 15, 2026 |

***Summary:***

*West High Yield (W.H.Y.) Resources Ltd. ("WHY") seeks leave to appeal from an interlocutory injunction enjoining it from undertaking construction or other ground-breaking activity at its Record Ridge Mine site, pending determination of the respondent Save Record Ridge Action Committee Society's petition for judicial review from a decision under the Environmental Assessment Act. HELD: Leave to appeal is refused. The chambers judge found that the driving force behind the injunction application was difficulty in securing a timely date for the hearing of the underlying petition, and that this time pressure was attributable largely to the refusal of WHY to agree to a hearing date before construction of the mine was expected to begin. Some of the proposed grounds of appeal have arguable merit, however determination of the issues raised in the appeal will not advance the underlying litigation, and none of the proposed grounds raise issues of broader significance to the practice. The underlying petition for judicial review is now set for hearing on 4 May 2026, raising the possibility or likelihood that it will be decided on its merits before an appeal from the injunction decision could even be set for hearing in this Court. On balance, it is not in the interests of justice to grant leave to appeal.*

**RILEY J.A.**:

## Introduction

[1] The applicant, West High Yield (W.H.Y.) Resources Ltd. ("WHY"), seeks leave to appeal a decision of a justice of the British Columbia Supreme Court, in chambers, granting an interlocutory injunction enjoining it from undertaking any construction or other ground-breaking activity at its Record Ridge Mine site, pending determination of a petition for judicial review brought by the respondent, Save Record Ridge Action Committee Society ("SRR"). In the underlying petition, SRR seeks judicial review of the decision of the Environmental Assessment Office ("EAO"), holding that WHY's Record Ridge mining project would not be subject to assessment under the *Environmental Assessment Act*, S.B.C. 2018, c. 51 [*EAA*].

## Background

### The Mine Project

[2] The proceedings relate to WHY's Record Ridge Mine, located some seven kilometers southwest of Rossland, British Columbia.

[3] Dr. Kamaleddine, a director of WHY, describes the Record Ridge Mine as an "advanced-stage magnesium industrial quarry-style open pit operation involving the mining of magnesium-bearing rock, on-site crushing, and transportation of material off-site for further processing". The project design includes an open pit mine, waste rock storage, and soil stockpiles. As Dr. Kamaleddine notes, the mine will produce ore which will then be transported offsite on large trucks.

[4] Although the project design went through several iterations, the final design will have an annual production capacity of 63,500 tonnes of ore per year. This is under the threshold of 75,000 tonnes per year that would make the project automatically reviewable under s. 9 of the *EAA* and associated *Reviewable Projects Regulation*, B.C. Reg. 243/2019 [*RPR*s]. As explained in more detail below, the EAO also declined to designate the mine for environmental review under s. 11(5) of the *EAA*.

[5] The Record Ridge Mine has the support of the Osoyoos Indian Band. However, there are several organizations opposed to the mine proceeding, due primarily to environmental concerns. Two of these organizations are SRR and the Sinixt Confederacy ("Sinixt"). There are others who have expressed opposition to the project, but these two organizations were involved in the litigation in the court below.

**Timeline**

[6] On 13 August 2025, an EAO Designation Review Report determined that the Record Ridge Mine project was not substantially started and was not prescribed as a "reviewable project" under the *RPR*s because its designated production capacity was under 75,000 tonnes of ore per year.

[7] On 19 August 2025, the EAO issued its decision declining to designate the Record Ridge Mine project for environmental assessment under ss. 11(5) to (6) of the *EAA*.

[8] On 22 September 2025, SRR filed a petition in Supreme Court, seeking judicial review of the EAO's decision. In its petition, SRR took issue with: (i) EAO's

finding that the Record Ridge Mine was an "eligible project" under s. 11(1) of the *EAA*, and (ii) EAO's discretionary decision not to designate the mine for environmental assessment under ss. 11(5) to (6) of the *EAA*.

[9] Commencing in late September 2025, SRR made efforts to set its petition down for hearing in the Supreme Court. The chambers judge found that a principal hurdle in securing a timely hearing date was the consistent position of WHY that its counsel had no availability until August 2026.

[10] On 20 October 2025, WHY was granted a permit under the *Mines Act*, R.S.B.C. 1996, c. 293, to operate the Record Ridge Mine, commencing 1 April 2026.

[11] On 27 November 2025, SRR notified WHY of its intent to seek a stay of the *Mines Act* permit, although, as explained below, SRR did not file a stay application until January 2026.

[12] On 13 January 2026, SRR filed a notice of application seeking either (i) a stay of the *Mines Act* permit, or (ii) an interlocutory injunction enjoining WHY from commencing mining operations.

[13] On 3 March 2026, SRR's petition for judicial review of the EAO decision was formally scheduled for a four-day hearing in the Nelson Supreme Court, commencing 17 August 2026. Although counsel for SRR had proposed a number of earlier dates, the August dates were the first dates when WHY's counsel was available.

[14] On 9 and 10 March 2026, the chambers judge heard SRR's application for an interlocutory injunction, enjoining WHY from commencing construction at the Record Ridge Mine site until the Supreme Court renders a decision on the merits of SRR's petition.

[15] On 11 March 2026, the chambers judge issued an interlocutory injunction, enjoining WHY from commencing construction or any other form of groundbreaking activity at the Record Ridge Mine site, until SRR's petition is decided. The chambers

judge also made several other orders intended to reduce or minimize the prejudice to WHY arising from the injunction, as explained below.

[16] In reaching this decision, the chambers judge considered and applied the well-known three-part test governing interim injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. As discussed in greater detail below, the judge cited case law acknowledging that the three elements of the test are not watertight compartments, in that the relative strength or weakness of a party's position on one element of the test may be relevant in assessing the other two elements. In the end, the question is whether it is in the interests of justice to grant an interlocutory injunction.

[17] On the first branch of the *RJR-MacDonald* analysis, the chambers judge found that SRR's position on the judicial review was arguable, though not "particularly strong". He stated that SRR faced an "uphill challenge" in its judicial review of the EAO's decision, in the wake of case law interpreting and applying the relevant provisions of the *EAA*.

[18] On the second branch, the chambers judge was satisfied that in the absence of an injunction, SRR would suffer irreparable harm. The judge reasoned that if WHY went ahead with the Record Ridge Mine project before the petition was decided on its merits, there was a risk that the project could pass the "substantially started" threshold contemplated in s. 11(1) of the *EAA*, such that it would no longer qualify as an eligible project subject to discretionary review under ss. 11(5) and (6) of the *Act*.

[19] On the third branch of the analysis, the chambers judge determined that the balance of convenience favored SRR. On the one hand, if no injunction was issued, the ultimate relief SRR seeks on its petition — review of the Record Ridge project under the *EAA* — might no longer be available. On the other hand, if an injunction is issued, then WHY would not be able to move forward with the project until the petition is determined, resulting in a substantial loss of mining revenues. However, the judge reasoned that WHY would still be able to proceed with preparatory work, so long as there is no significant disturbance of the landscape. Further, the judge

reasoned that the circumstances were unique because if SRR had not been presented with scheduling difficulties in setting the petition down for hearing, it could have been heard before the 1 April 2026 start date when WHY's mining permit "became a concern". In the judge's view, to accede to WHY's position would be "tantamount to [the] Court endorsing unavailability as a reason to delay the otherwise timely hearing of a dispute".

[20] The judge's conclusion on this particular point is set out at paras. 39–40 of the decision, as follows:

> [39] Here, the petitioner was reasonable in their request for hearing dates. Other parties were prepared to adjust their calendars so as to have the matter heard in a timely fashion. By simply making themselves available to argue the petition in early 2026, WHY could have avoided the prospect of an injunction. Refusing to agree to a hearing date until August was unreasonable.
>
> [40] In all of the circumstances, the granting of a time-limited injunction is just and equitable. It will allow all parties to argue the issues on their merits. To do otherwise would deny the petitioner access to justice.

[21] The judge reasoned that he could lessen the burden of the injunction by (i) replacing SRR's obligation to provide an undertaking as to damages with an obligation to deposit $162,500 into trust, and (ii) re-scheduling the hearing date for the petition to 5 May 2026, at an assize sitting of the Supreme Court in Rossland.

## Appeal Proceedings

### The Leave Application and Associated Fresh Evidence Application

[22] On 12 March 2026, WHY filed an application for leave to appeal from the chambers judge's interlocutory injunction decision.

[23] On 24 March 2026, WHY filed an application to adduce fresh evidence, in the leave application and, if leave is granted, on the appeal itself.

### Late Filed Materials

[24] Between 24 March 2026 and 8 April 2026, various materials were filed in connection with the hearing of WHY's leave and fresh evidence applications. The

respondents SRR and Sinixt filed their materials after the deadlines provided for under the *Court of Appeal Rules*, B.C. Reg. 120/2022. At the outset of the hearing, I granted extensions of time for the late-filed materials, being satisfied that WHY was not substantially prejudiced by the delay.



**WHY's Objection to Sinixt's Standing**

[25] Before discussing the merits of the application, I will address one other preliminary matter, which is WHY's submission that Sinixt is not a proper respondent in these proceedings and should not be heard in opposition to the leave application.

[26] WHY points out that in the court below, Sinixt was named as a petition respondent, but its position aligned with that of SRR. Thus, WHY argued, and the chambers judge accepted, that Sinixt should not have been permitted to file anything other than an application response indicating that it did not oppose the relief sought in SRR's injunction application. WHY also says it has a pending application to strike Sinixt as a party to the Supreme Court proceedings, which I gather is set for hearing one week after the leave application.

[27] In this Court, WHY maintains that for similar reasons, Sinixt should not have standing to make submissions on this application. WHY says Sinixt has no direct interest in the proceedings, and its participation in the application is mere piling on.

[28] I do not agree that Sinixt is not a proper respondent in this Court. Under Rule 6(1)(a) of the *Court of Appeal Rules*, a party who seeks to appeal must name as a respondent each person (a) who was a party in the proceeding below, and (b) whose interest could be affected by the relief sought on appeal. In this case, Sinixt was a party in the proceeding below when the decision under appeal was made. The fact that WHY has a pending application to strike Sinixt as a respondent in the court below does not alter this reality. I also hold the view that Sinixt is a party whose interests could be affected by the relief sought on appeal, in the very basic sense that Sinixt is opposed to the Record Ridge Mine proceeding to operations, and the order in the court below enjoins WHY from starting operations until the petition

challenging the EAO decision is decided. Thus, at a very basic level, Sinixt's interests could be affected by an order overturning the interlocutory injunction.

[29] To account for WHY's concern about piling on, I directed that court time for oral submissions on the leave application would be divided equally between WHY on the one hand, and the two respondents, SRR and Sinixt, on the other.

## Legal Principles

### Legal Principles Governing Leave to Appeal

[30] An interlocutory injunction is listed as a limited appeal order under Rule 11(a)(v) of the *Court of Appeal Rules*. Accordingly, WHY requires leave to appeal under s. 31 of the *Court of Appeal Act*, S.B.C. 2021, c. 6.

[31] The four criteria considered in deciding whether it is in the interests of justice to grant leave to appeal are: (i) whether the points raised on appeal are of significance to the practice; (ii) whether the points raised are of significance to the action itself; (iii) whether the appeal is *prima facie* meritorious, or alternatively whether it is frivolous; and (iv) whether the appeal will unduly hinder the progress of the proceedings: *Saran v. Cartonio, Inc.*, 2020 BCCA 252 at para. 14 (Chambers), applying *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers). The overarching consideration is the interests of justice: *Saran* at para. 15, applying *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).

### Legal Principles Governing Fresh Evidence

[32] The admission of fresh evidence on appeal is generally decided based upon a consideration of the four criteria set out in the leading case of *Palmer v. The Queen*, [1980] 1 S.C.R. 759, namely: (i) whether, with due diligence, the evidence could have been adduced in the court of first instance; (ii) whether the evidence bears on a potentially decisive issue; (iii) whether the evidence is credible; and (iv) whether the evidence, considered in conjunction with the record in the court of first instance, is of such significance that it could affect the result.

[33] In *Gudaitis v. Abacus Systems Inc.* (1992), 65 B.C.L.R. (2d) 1 (C.A.) (Chambers), Justice Hinds addressed the manner in which fresh evidence is dealt with by a chambers judge, in the context of an application for leave to appeal. A justice in chambers has the discretion to consider the fresh evidence, taking into account the *Palmer* criteria, though the question of ultimate admissibility must be left to the division that hears the appeal, if leave is granted. Thus, it has been said that a justice in chambers can consider the admissibility of the fresh evidence on a *prima facie* basis only, for the purposes of deciding the leave application: *Aulakh v. WIT Management Corp.*, 2022 BCCA 356 at para. 46 (Chambers). It has also been acknowledged that the *Palmer* criteria are applied "less strictly" on an interlocutory application such as the one before me: see *Aulakh* at para. 46 and the cases cited therein.

## Discussion

### The Fresh Evidence Application

[34] The fresh evidence falls into two categories. First, there is evidence that WHY has now entered into a formal contractual arrangement with Galaxy Trade and Technology, LLC ("Galaxy"), under which Galaxy will purchase ore from the Record Ridge Mine. Second, there is evidence of additional costs incurred by WHY to advance the Record Ridge Mine toward construction.

[35] I would not admit the fresh evidence, for the following reasons.

[36] I accept that, even with due diligence, this evidence could not have been tendered in the court below, because it is basically new information. The Galaxy agreement was concluded during the last day of the injunction hearing, and there was no way to place it before the court without significant disruption or an adjournment. Many of the additional costs appear to have been incurred after the date of the injunction decision.

[37] I also accept that the fresh evidence is relevant because it goes directly to various considerations weighing in WHY's favour on the balance of convenience,

and that it is *prima facie* reliable because the evidence comes from a credible source and there is no reason to question it.

[38] However, I find the evidence does not meet the test of materiality because, even if the evidence were admitted, it would not materially alter the conclusion on the leave application. Even accepting that WHY now has a binding agreement for the sale of its ore, generating substantial monthly revenues as explained below, and that WHY has continued to incur post-permit costs, now totalling some $1,000,000, necessary to make the mine ready for production, this evidence does not assist in showing that the chambers judge committed any error in principle in his analysis of the injunction application. While the new evidence bears on the balance of convenience, in my view, it does not alter the analysis to such an extent that the outcome is manifestly unjust to the point where the Court would be inclined to revisit it on appeal. Nor does the fresh evidence shed any light on the significance of the issues raised on appeal to the underlying petition, or to the practice more generally.

[39] In summary, the fresh evidence does not materially affect the decision I need to make, which is whether to grant leave to appeal from the interlocutory injunction order granted by the chambers judge. I would not admit the fresh evidence on the leave application, although of course this would not determine admissibility in relation to the appeal itself.

**The Leave Application**

***Significance to the Practice***

[40] WHY says the appeal is significant to the practice because it raises important questions about the extent to which an interlocutory injunction ought to be allowed to interfere with the proper operation of the regulatory approval process for resource projects. The Record Ridge Mine has been vetted and allowed to proceed under both the *EAA* and the *Mines Act*, and the injunction is said to represent an intrusion on the decision-making processes of those charged with the administration of these regulatory schemes. This is reflected in the presumptive standard of reasonableness applicable on judicial review of administrative law decisions, in which the reviewing

court does not step into the shoes of the decision-maker, but rather, asks whether the decision is reasoned, transparent, and justified based on the relevant factual and legal constraints. WHY says it is important to the practice for this Court to address the extent to which injunctive relief should be invoked to intrude upon administrative law processes.

[41] SRR and Sinixt advance several arguments in response to this submission.

[42] First, they say there is no case law suggesting that any different standard or different legal test governs applications for injunctive relief in this context. There are, the respondents submit, decided cases in which the *RJR-MacDonald* analysis has been applied to either grant or refuse interlocutory relief pending judicial review of an administrative law decision relating to resource or environmental considerations: see, for example, *ʔAkisq̓nuk First Nation v. British Columbia Environmental Appeal Board*, 2025 BCSC 616 at paras. 13–14, 16; *Penner v. British Columbia (Minister of Forests, Lands, & Natural Resources)*, 2018 BCSC 26 at para. 40. See also *Stanley Park Preservation Society v. Vancouver Board of Parks and Recreation*, 2026 BCCA 21 (Chambers), review application dismissed, 2026 BCCA 85, applying the *RJR-MacDonald* framework in the context of an application to enjoin tree removal pending the hearing of an appeal from a judicial review decision concerning the validity of various Park Board resolutions. There are no clearly contradictory decisions suggesting that the *RJR-MacDonald* framework does not apply in this context.

[43] I agree with the respondents on this point. In my view, there is at present no legal controversy or uncertainty as to the application of the *RJR-MacDonald* analysis in this context, and the criteria set out in that case and applied in many subsequent cases are flexible enough to accommodate the competing interests at stake.

[44] Second, the respondents submit that the question is not whether the proposed appeal raises some broad theme of general importance, but rather whether the proposed grounds of appeal as framed by the applicant are matters of importance to the practice.

[45] I agree with this submission as well. If leave to appeal is granted, a division of the Court would be required to consider and address the specific grounds of appeal put forward by the appellant. The question is whether those particular grounds of appeal are of importance to the practice.

[46] That brings me to the six grounds of appeal. WHY alleges that the chambers judge erred by: (1) failing to characterize SRR's application as a "*quia timet*" injunction, with special legal requirements to be met; (2) treating the *RJR-MacDonald* factors as "equally weighted, independent inquiries rather than interrelated considerations"; (3) finding that SRR's application could become "moot" if the injunction was not granted; (4) concluding, without an evidentiary foundation, that in the absence of injunctive relief the Record Ridge Mine project would be "substantially started" before the petition was heard; (5) ignoring SRR's delay in bringing the application, and attributing the scheduling difficulty solely to the position taken by WHY; and (6) moving up the petition hearing date to 5 May 2026, when none of the parties had asked for it to be re-scheduled from the 17 August 2026 hearing date.

[47] With regard to the first two grounds of appeal, I accept that they appear to raise extricable questions of law. However, in my view, the governing law is settled and not in need of clarification, at least in the current context.

[48] On the first ground, WHY relies on *Harness Racing B.C. Society v. Orangeville Raceway Limited*, 2025 BCSC 1249, for its discussion of the principles applicable to *quia timet* injunctions. In my view, *Harness Racing B.C. Society* is distinguishable because it involves an application for injunctive relief based upon an anticipated future breach of private law contractual obligations. WHY has not cited any cases in which *quia timet* injunction principles have been applied in the context of an application to enjoin prospective conduct pending the determination of a judicial review. In *ʔAkisq̓nuk First Nation*, the court considered an injunction to enjoin prospective dredging of a lake pending the determination of a judicial review, without any consideration of principles governing *quia timet* injunctions. In *British Columbia*

*(Attorney General) v. Harm Reduction Nurses Association*, 2024 BCCA 87 (Chambers), Justice Skolrood (then of this Court) dismissed an application for leave to appeal from an interlocutory injunction enjoining the coming into force of legislation limiting the geographic ambit of supervised drug consumption sites. Once again, the injunction was granted based on an application of the *RJR-MacDonald* framework, without any consideration of *quia timet* principles, even though the legislation that was subject to challenge had yet to come into force.

[49] On the second ground, WHY's position on appeal rests on the contention that the chambers judge failed to give effect to the notion that the three elements of the *RJR-MacDonald* analysis ought not to be treated as watertight compartments. That is a case-specific argument, made against the backdrop of a body of settled law discussing the relationship between the three elements of the test: see *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 37–38, citing *Coburn v. Nagra*, 2001 BCCA 607 at para. 7 and *Mosaic Potash Esterhazy Limited Partnership v. Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120 at para. 26. In the case at bar, the judge did in fact cite cases recognizing the legal proposition relied upon by WHY. The argument that WHY advances is even though the judge set out the law correctly, he failed to apply it. That is a case-specific argument that does not necessarily assist or advance the state of the law generally to the benefit of the practice.

[50] With regard to the last four grounds of appeal, in my view, each of these points is highly fact-dependent and case-specific. These grounds turn mostly on the chambers judge's assessment of the chronology of the proceedings, the efforts to schedule the petition hearing before the 1 April 2026 start date when WHY's mining permit "became a concern", and the implications of counsel for WHY's unavailability for a hearing date before 17 August 2026. A decision from this Court on the merits of these issues is not likely to be of any interest to anyone other than the parties to this appeal, and those directly interested in the status of the Record Ridge Mine. These grounds of appeal do not raise issues of general importance to the legal community.

[51] In my view, this factor weighs against granting leave to appeal.

***Significance to the Underlying Action***

[52] In my view, none of the grounds of appeal raised by WHY will advance the underlying proceeding, which is a petition for judicial review. The issues raised in the leave application have to do with the question of injunctive relief. Even if WHY was successful in overturning the injunction, this would have no legal impact on the merits of the petition, which is now set for hearing on 4 May 2026, and may well be decided before the appeal could even be set down for hearing. In *Harm Reduction Nurses Association* at paras. 38–39, Justice Skolrood cited *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 59 (Chambers), in which Justice Newbury described a proposed appeal from an interlocutory injunction as a theoretical distraction from the issues raised in the underlying proceeding. The same reasoning applies in this case. This factor weighs against granting leave to appeal.

***Whether the Proposed Appeal is Meritorious***

[53] The respondents emphasize that injunctive relief is equitable and discretionary in nature, and that the appeal court will generally show deference to the lower court's weighing of the relevant considerations. They say WHY will face a high hurdle in demonstrating that the chambers judge committed a reviewable error justifying appellate intervention. Finally, they say that the outcome is case-specific and turns largely on the chambers judge's conclusion that the need for the injunction only arose because of scheduling issues, tied directly to WHY's unwillingness to agree to a petition hearing date before 17 August 2026. They say it is unlikely that this Court would revisit the judge's key findings, and therefore unlikely that the appeal will succeed on its merits.

[54] For my part, I find that the first two grounds of appeal raise extricable questions of law that have at least some arguable merit.

[55] In particular, I find that the second ground of appeal raises an extricable question of law that is arguable. In WHY's submission, the chambers judge found that the grounds of judicial review in the underlying petition were not "particularly strong", but then failed to factor the relative weakness of SRR's position on the merits into his assessment of the competing interests at stake in the balance of convenience analysis. Counsel for Sinixt responds that the judge is presumed to know the law and to have applied it correctly, in the absence of some indication that he failed to do so. This is true. It is also true that the chambers judge cited case law reflecting the principle that the three elements of the *RJR-MacDonald* analysis are not watertight compartments such that weaknesses in one of the elements may have a bearing on assessment of the other elements of the test. The ultimate success of WHY's argument therefore rests on the submission that, even though the judge properly instructed himself on the governing legal principles, he then failed to heed those principles in his analysis of the three elements of the test. This point is arguable either way. There is nothing in the judge's discussion of the balance of convenience to indicate that he expressly considered the relative weakness of SRR's position on the merits of the petition. However, one must place that up against the judge's finding that the fundamental problem in this case was WHY's refusal to agree to a hearing date before 17 August 2026, and the injustice and prejudice that this scheduling position could cause to the interests of SRR in having the petition heard before it becomes moot. This is why I say this ground of appeal is arguable either way.

[56] With regard to the last four grounds of appeal (grounds (3) to (6) as summarized above), in my respectful view, these grounds are weak. They raise questions of mixed fact and law, or questions of fact, subject to review on a highly deferential standard of palpable and overriding error.

[57] I acknowledge WHY's point that grounds (3) and (4) involve some consideration of the legal requirements for what constitutes an "eligible project" under s. 11(1) of the *EAA*. In WHY's submission, the chambers judge's finding that the petition could be rendered moot turns at least in part on the meaning of the

phrase “substantially started” in s. 11(1). However, the mootness finding did not turn on a pure question of statutory interpretation, but rather, on the question of whether the evidence placed before the chambers judge provided some factual basis for his conclusion that the Record Ridge Mine could be “substantially started” before the petition hearing set for 17 August 2026. There was a substantial body of evidence before the chambers judge to show that WHY was intent on breaking ground and commencing commercial production as soon as possible after the *Mines Act* permit came into effect on 1 April 2026. This included evidence of one of WHY’s directors, in a media interview, stating his expectation that construction at the mine site would begin in June. For all of these reasons, I consider that grounds (3) and (4) are not strong.

[58] Grounds (5) and (6) turn on the chambers judge’s assessment of procedural history and scheduling issues, and how they impact upon the balance of convenience analysis. In my view, these grounds raise questions of fact that turn on the evidentiary record. Based on his appreciation of the record, the chambers judge found that, while other parties were prepared to adjust their scheduling positions to ensure that the petition could be heard in a timely fashion, WHY unreasonably refused to make itself available for a hearing before 17 August 2026. Although WHY may disagree with the chambers judge’s finding, it will be difficult to establish that the judge’s assessment of the record was palpably wrong.

[59] WHY also raises an alternative ground of appeal, that the chambers judge erred in ordering SRR to provide security in the amount of $162,500, in lieu of an undertaking as to damages. WHY submits that the security arguably relieves SRR from potential liability for damages in excess of this amount. WHY says that security of $162,500 is a mere fraction of the post-permit costs it has incurred to make the mine ready for production. The chambers judge took into account that SRR was an organization with “limited means”, unlikely to be able to pay a “large damage award”. The judge balanced this against the fact that, in his view, the injunction only became necessary because of WHY’s failure to make itself available for an earlier petition hearing date. The judge further reasoned that “[a]n undertaking to pay damages is

only as good as the ability to pay", particularly in respect of a corporate body like SRR. The judge determined that the most appropriate and meaningful form of security was an order requiring SRR to pay $162,500 into trust. This presents as a classic exercise in discretion, in deciding which conditions were most appropriate to attach to an order enjoining WHY from proceeding with construction at the mine site prior to a decision on the merits of the petition. WHY may disagree with the conclusion that the judge reached, but will have a hard time showing that his exercise of discretion was tainted by some reviewable error.

[60] I conclude that at least some of the grounds of appeal are arguable. Keeping in mind that the merits threshold at the leave stage is "relatively low" and applying the reasoning in *Harm Reduction Nurses Association* at para. 33, I would not "decline to grant leave to appeal based upon a preliminary assessment of the merits of the proposed appeal". If required to place this factor on the scale with all the others, I find that it weighs in favour of granting leave to appeal.

***Whether the Appeal Will Unduly Hinder the Progress of the Proceedings***

[61] WHY says that the appeal from the injunction will not affect the progress of the petition, which is now set for hearing on 4 May 2026. The respondents disagree, arguing that the appeal will distract the parties from the task of ensuring that the petition hearing proceeds as scheduled. I accept WHY's submission that granting leave to appeal will not create any legal impediment to the petition hearing proceeding as scheduled. However, I also agree with the respondents that, at a practical level, the time, energy, and resources required to litigate an interlocutory appeal of the injunction order could distract the parties from arguing the merits of the petition, the timely resolution of which is in everyone's interest. On balance, this factor weighs against granting leave, but only slightly.

***Interests of Justice***

[62] This is a unique case. I can certainly appreciate WHY's concern that the injunction could result in a delay or possibly a loss of substantial mining revenues during the mine's 2026 operating window, in the context of a *Mines Act* permit that is

set to expire in two years. However, the chambers judge found that the driving force behind the injunction application was difficulty in securing a timely date for the hearing of the underlying petition, and that this time pressure was attributable largely to the refusal of WHY to agree to a hearing date before 17 August 2026. This is a case-specific finding, based on the chambers judge's assessment of the evidence.

[63] Some of the proposed grounds of appeal have arguable merit, however determination of the issues raised in the appeal will not advance the underlying litigation, and none of the proposed grounds raise issues of broader significance to the practice.

[64] There are also reasons to question whether the appeal will become moot before it is heard. This is because the underlying petition for judicial review is now set for hearing on 4 May 2026, raising the possibility or likelihood that it will be decided on its merits before an appeal from the injunction decision could even be set for hearing in this Court. Furthermore, if the judge who hears the petition determines that the time required to decide the matter on its merits could significantly impact on the balance of convenience, this could constitute a change in circumstance warranting reconsideration of the injunction.

[65] In all of the circumstances, I find that it is not in the interests of justice to grant leave to appeal.

## Conclusion

[66] The application for leave to appeal is dismissed. The fresh evidence application is adjourned generally.

"The Honourable Justice Riley"